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DIVISION II
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

CHAD MITCHELL BURTON,

Respondent,

and

DEBORAH RENEE BURTON,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
THE HONORABLE JOHN F. NICHOLS

BRIEF OF RESPONDENT

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I. RESTATEMENT OF ISSUES

1. The trial court admitted the parenting evaluator's report, which included the recommendation that the appellant advocated below, as evidence, and gave the appellant an opportunity to call the parenting evaluator as a witness at trial. Can it be considered "error" by the trial court to have not heard testimony from the parenting evaluator when the appellant failed to call the evaluator for trial?

2. Over the three years since the parties separated, the appellant failed to correct any of the deficiencies that were brought to her attention by professionals. Instead, her behavior worsened. As a result, the children suffered, and only improved once they were placed primarily with the father under a temporary parenting plan. In making the final parenting plan, was the trial court required to accept the recommendation of a parenting evaluator that the appellant be allowed an avenue to eventually resume her status as primary residential parent when the trial court found that it was in the children's best interests to reside primarily with the father?

3. Will this court vacate findings of fact based on substantial evidence because appellant claims that they are "lop-

sided and one-dimensional in favor of the husband against the wife?"

4. Should this court reject the appellant's argument that the trial court abused its discretion in not reducing her money award to judgment when she failed to ask for this relief below and fails to cite any authority in this court for her claim that without a judgment she is prevented from enforcing the decree of dissolution?

5. The parties were separated for three years, during which time the husband continuously provided support to the appellant, both voluntarily and under court orders. The appellant is young and as the trial court found, capable of obtaining full-time employment, and has had ample time to pursue employment or obtain retraining. Did the trial court abuse its discretion in considering the substantial support already provided to the appellant during the parties' separation in making its maintenance award at the end of the parties' 12-year marriage?

6. Does substantial evidence support the trial court's determination that the parties separated in March 2009 based on the husband's testimony at trial and the appellant's admission to the parenting evaluator that this was date the parties separated?

7. Was the trial court required to address the appellant's "forlorn hope" for an award of attorney fees when she failed to formally request attorney fees?

II. RESTATEMENT OF FACTS

A. The Parties Have Three Children. They Were Married For Nearly 12 Years When They Separated.

Respondent Chad Burton, age 38, and appellant Deborah Burton, age 37, were married on July 12, 1997. (RP 43; CP 47) The parties have three children: Nick, now age 13, Eli, now age 10, and Ava, now age 8. (RP 46) Chad owns a financial planning business with one other partner, and earns monthly net income of approximately $10,000. (RP 43, 85-86, 103) Deborah did not work outside of the home during the marriage. (RP 199)

The parties separated on March 12, 2009 after a domestic violence incident that resulted in Chad's arrest and his departure from the family home. (RP 43, 72) Chad explained that the incident occurred in part due to stress from work – "going through the most massive amount of stress in stock market history" – and finding out that Deborah had been having an affair. (RP 72) Ten months later, on January 22, 2010, Chad filed a petition to dissolve the parties' marriage in Clark County Superior Court. (RP 264-65)

Although Deborah challenges the date of separation (App. Br. 21), she reported to the parenting evaluator, Dr. Landon Poppleton, that the parties indeed separated in March 2009. (Exhibit 1: Poppleton May 22, 2011 Evaluation at 13)[1] Although the parties had apparently continued to have some intimate relations during the ten-month period between when Chad moved out of the home and when he filed for divorce, Deborah was still involved with the man with whom she was having an affair – a relationship that had started in August 2008 – and Chad eventually started dating another woman. (RP 63, 170)

As a result of her other relationship, Deborah gave birth to a fourth child in August 2010, after Chad had already filed for divorce. (RP 6, 65-66) To the extent there was any discussion of "reconciliation" prior to Chad filing the petition for dissolution, it was based on Deborah's claim that she was no longer having an affair and her claim that Chad was the father of her youngest child. (RP 6-7, 62-65, 151-52)

When Chad questioned the child's paternity, Deborah falsified a paternity test by swabbing the cheek of one of the parties'

[1] The evaluators' reports were admitted as one exhibit. (Exhibit 1)

children to "prove" to Chad that he was the father of her youngest child. (RP 65) Chad only discovered that he was not the father after obtaining his own paternity test approximately seven months later. (RP 62, 65-66; FF 2.19(3), CP 20))

B. During The Separation, The Mother Alienated The Children From The Father And Became Increasingly Emotionally Unstable.

It is undisputed that the parties had a turbulent marriage, marked with conflict from both sides. After the parties separated, Deborah became less stable, blamed Chad for the end of the marriage, and became increasingly angry, with no sign of abatement. (RP 66-67) The trial court expressed concern that Deborah had "major emotional issues," and that her anger towards Chad caused her to be "mentally abusive." (Finding of Fact (FF) 2.19 (7), CP 21)

In February 2012, just a few months before trial, Deborah was arrested after she attacked Chad and his girlfriend. (RP 49) During this attack, Deborah left the parties' oldest child and her youngest child alone in her car and left the other two children home alone without a working phone. (RP 49, 67) As a result of this and other incidents described at trial, the trial court found Deborah "assaultive and combative." (FF 2.19 (4), CP 20)

Deborah threatened to call Chad's clients to tell them that he was an "awful person." (RP 70) Deborah told the children that Chad is a "bad person," who won't provide her with money. (RP 66, 70) Chad believed that Deborah was sharing too much information about the divorce and the parties' issues with the children. (RP 48-56, 70) Chad was concerned that Deborah did not care that she hurts the children when she exposes them to the parties' conflict. (RP 58) The trial court found that Deborah's "alienation attempts are a form of emotional abuse of the children." (FF 2.19 (7), CP 21) Deborah's "campaign" to alienate the children from Chad caused the children to suffer in ways that manifested differently with each child. (RP 47-56)

Only after the children were placed primarily with Chad, later in the divorce proceedings, did they start to improve. (RP 58) Chad provided the children with structure that they were lacking when they were living primarily with Deborah. (RP 58) Chad also shielded the children from the issues between the parents. (RP 58) The trial court found that while "the kids are still suffering from the effects of the divorce, [they] are otherwise doing well in the care of the father." (FF 2.19 (14), CP 22)

C. The Parties Participated In Two Separate Parenting Evaluations. Each Evaluator Ultimately Concluded That The Father Was The More Stable Parent And Should Be Designated The Primary Residential Parent.

1. After Evaluating The Family Between February 2010 And February 2011, The First Evaluator Recommended That The Father Be Designated The Primary Residential Parent.

In February 2010, the court appointed Jeff Foster to provide a parent-child study and mental health evaluation of both parties. (RP 5) This evaluation was conducted over the course of a year, concluding in February 2011. (RP 5)

Foster expressed concern that Deborah was emotionally unstable and was concerned about the impact her emotional state had on the children. Foster described Deborah as "extremely angry, to a degree outside of normal expectations for victims and survivors of domestic violence." (RP 6) Foster was concerned that Deborah "was not able to contain her anger [and] that she had been explosive and inappropriate on several occasions; that she had done so in front of the children." (RP 6) Foster described an incident when Deborah spoke of Chad right in front of the children "in extremely negative terms," and "in a way that was not appropriate for the children to hear." (RP 11)

Foster was concerned that Deborah "stubbornly maintained [a] high degree of anger towards [Chad]" and "allowed this to color her interactions with the children to a degree that it was becoming harmful to them, and had the probability of becoming increasingly harmful." (RP 9) Foster agreed with Chad that Deborah "was giving the children too much adult information, including her negative assessment of their father and his girlfriend." (RP 6)

Foster concluded that Deborah "wasn't benefitting from intervention and continued to get worse as time went along." (RP 6; *see also* RP 16-17) Despite Foster's attempts to counsel Deborah to avoid behaviors that alienated the children from Chad, "she simply did not seem to benefit from my counsel or the process of evaluation." (RP 12-13; *see* also RP 17-18) Foster concluded that Deborah was "emotionally unstable; behaviorally inappropriate in a way that was detrimental to the children; and not an accurate reporter of events." (RP 7)

Foster believed that while Deborah was "quite duplicitous" and not an "accurate reporter," Chad had been "frank" with him regarding past domestic violence issues with Deborah. (RP 6, 7, 8) Chad was engaged in domestic violence counseling and Foster believed that Chad "benefitted from treatment." (RP 7, 8) Chad's

domestic violence counselor also reported to Foster that Chad "was doing a good job of containing his anger." (RP 8) Foster concluded that between the parents, Chad was "the more appropriate, emotionally and behaviorally stable parent." (RP 35; *see also* RP 8) Foster recommended that "the children would be best off placed in [Chad's] primary residential care." (RP 7; *see also* RP 15, 35)

2. A Second Evaluator Evaluated The Family Between May 2011 And March 2012. While Initially Recommending That The Mother Be Designated The Primary Residential Parent, He Ultimately Recommended That The Father Be The Primary Residential Parent.

In March 2011, Landon Poppleton was appointed to conduct a psychological evaluation of Deborah. (Exhibit 1: Poppleton March 8, 2011 Evaluation) Poppleton described Deborah as a "black and white thinker," "emotionally reactive," and "struggles with letting go and carries a grudge." (Exhibit 1: Poppleton March 8, 2011 Evaluation at 8) Deborah admitted to Poppleton that she has exposed the children to her "reactivity and conflict with Chad." (Exhibit 1: Poppleton March 8, 2011 Evaluation at 9) Poppleton expressed concern that "currently the risk her mental status poses to her children is the exposure to conflict it creates for them and her inability to disengage from Chad." (Exhibit 1: Poppleton March 8,

2011 Evaluation at 9) Poppleton reported that "the ongoing concerns expressed about her parenting abilities can best be accounted for by the amount of energy she puts toward Chad, energy that should be allocated towards more productive pursuits, including time with her children, maintaining her home, and filling her time with other productive activities." (Exhibit 1: Poppleton March 8, 2011 Evaluation at 9)

After completing this psychological evaluation of Deborah, Poppleton was then asked to conduct a "bilateral custody evaluation" for the parties.[2] (Exhibit 1: Poppleton May 22, 2011 Evaluation) Poppleton expressed concern about the history of domestic violence between the parties, in which both parties had been perpetrators. (Exhibit 1: Poppleton May 22, 2011 Evaluation at 2) In addition to the domestic violence incident that resulted in the parties' separation, Deborah had also physically attacked Chad causing a wound to his head that required stitches. (Exhibit 1: Poppleton May 22, 2011 Evaluation at 22; *see also* RP 74, 76-77) Nevertheless, Poppleton concluded that Chad had been more

[2] It is not clear from the record the reason a second evaluation was completed.

"potent in his aggression" toward Deborah than she had been toward him. (Exhibit 1: Poppleton May 22, 2011 Evaluation)

Like Foster, Poppleton expressed concern about the risk to the children from alienation. Poppleton stated that the "Burton children are at significant risk of behavioral problems and aligning with one parent if the conflict continues at the current level." (Exhibit 1: Poppleton May 22, 2011 Evaluation at 2) However, unlike Foster, Poppleton believed that Deborah could "adjust to a 'new normal'" and "get back on track" and be a "good mother." (Exhibit 1: Poppleton May 22, 2011 Evaluation at 4) Poppleton recommended that Deborah be designated the primary residential parent, and that the children reside with Chad "at least 30% of the time." (Exhibit 1: Poppleton May 22, 2011 Evaluation at 4)

Poppleton submitted additional reports to the court after his initial evaluation in May 2011. On September 27, 2011, Poppleton revisited the family and expressed concern that the oldest child was aligning against Chad, and that Deborah was the "major influential factor." (Exhibit 1: Poppleton September 27, 2011 Evaluation at 3) Poppleton stated that "normal" parenting does not "include over-involving a child in divorce related matters and limiting contact with a parent due to complaints about a girlfriend," which

apparently Deborah had done. (Exhibit 1: Poppleton September 27, 2011 Evaluation at 3) Poppleton described the other children as also "struggling" and that the parties' second child, then age 8, was urinating in his room, and the youngest child, then age 6, was caught stealing from neighbors and from a store. (Exhibit 1: Poppleton September 27, 2011 Evaluation at 3) Nevertheless, despite these recent events, Poppleton did not change his recommendation for the residential schedule, concluding that "a change would not solve the problem." (Exhibit 1: Poppleton September 27, 2011 Evaluation at 4)

Nearly a year after his initial May 2011 report and six months after his September 2011 report, Poppleton submitted an "addendum" on March 6, 2012. Poppleton revisited the parties' past history of domestic violence, and concluded that "the abuse in the home was more consistent with *mutual couple's conflict* [than] *coercive and control violence.*" (Exhibit 1: Poppleton March 6, 2012 Evaluation at 3, emphasis in original)

Poppleton also revisited Chad's concerns regarding Deborah's alienation of the children. Poppleton expressed concern that while the children were previously simply "aligned" with the mother, they were now, especially the oldest child, "further down

the spectrum toward alienation." (Exhibit 1: Poppleton March 6, 2012 Evaluation at 1) Poppleton concluded that there is a "clear nexus between the children's sentiments about visitation, right versus wrong, [Chad's girlfriend], and their anxiety *and* Debbie's behavior in association to her attitude toward [the girlfriend] and lack of impulse control." (Exhibit 1: Poppleton March 6, 2012 Evaluation at 3, emphasis in original) This was concerning to Poppleton, because he had expressly counseled Deborah regarding her behavior and anger and the impact it had on the children. (Exhibit 1: Poppleton March 6, 2012 Evaluation at 1) Poppleton concluded that "this family is on a concerning trajectory that requires court and professional help." (Exhibit 1: Poppleton March 6, 2012 Evaluation at 4)

Poppleton changed his earlier recommendation and instead recommended that Chad be designated the primary residential parent. (Exhibit 1: Poppleton March 6, 2012 Evaluation at 4) Poppleton stated that only after Deborah accomplished "measurable criterion" and learned to "manage her emotions around the children, stop involving them in her fight with Chad [and] understand the affects [sic] her behavior has had on [the

children's] anxiety and attitude," should she resume primary care of the children. (Exhibit 1: Poppleton March 6, 2012 Evaluation at 4)

D. The Trial Court Designated The Father As The Primary Residential Parent, Divided The Community Property Equally, And Gave The Wife An Additional Six Months Of Maintenance.

The parties appeared before Clark County Superior Court Judge John Nichols on May 14, 2012. Chad was represented by counsel, and Deborah appeared pro se. Deborah had previously sought a continuance of the trial date, which was denied. (*See* CP 9, 62) Deborah does not challenge the order denying her requested continuance on appeal. Only the parties and the original evaluator, Jeff Foster, testified at trial. Although Deborah had apparently spoken on the phone with the second evaluator, Landon Poppleton, the morning of trial, she did not call him as a witness for trial. (RP 238)

The trial court designated Chad as the primary residential parent. (RP 303; CP 38) The trial court declined to adopt Poppleton's recommendation that left Deborah an opportunity to be designated as the primary residential parent if she met "measurable criterion." (*See* RP 303) The trial court found that

based on the "current status as indicated at the trial," the father should be the primary residential parent. (RP 303)

The trial court made extensive findings of fact in support of its parenting plan, largely reciting the detailed history of conflict between the parties. (FF 2.19, CP 18-22) Among its findings, the trial court found that Deborah has "not been mentally or emotionally stable" and "has failed to engage in meaningful court ordered psychological treatment." (FF 2.19 (1), (2), CP 19) The trial court found that Deborah "engaged in a pattern of alienation of the children from the father and abusive use of conflict." (FF 2.19 (3), CP 20) The trial court found that Deborah "has been assaultive and combative." (FF 2.19 (4), CP 20) The trial court acknowledged that Chad has had "issues with anger and domestic violence," but found that Chad has engaged in treatment and "has overcome those negative tendencies and has not let them affect his relationship with the children." (FF 2.19 (14), CP 22)

The trial court divided the parties' community property equally between the parties, leaving Chad responsible for all of the community debt of more than $126,000, and awarding him the parties' interest in his financial planning business. (*See* CP 27) To balance the property award, the trial court awarded Deborah an

equalizing cash award of $158,000 at 4% interest to be paid by Chad over 38 months at a monthly rate of $4,500. (CP 27-28)

Although the trial court found that Deborah had not specifically asked for maintenance, it awarded her monthly maintenance of $1,000 for six months, starting in June 2012. (FF 2.12, CP 16; CP 31) In making its decision, the trial court considered evidence that between June 2011 and trial in May 2012, Chad had transferred $54,000 to Deborah for her support – $18,000 more than he was ordered to pay under court orders – approximately $4,900 per month. (FF 2.12, CP 17; RP 56, 157-60, 261, 307, 308) Prior to June 2011, Chad had been paying Deborah $2,000 per month under a temporary order entered in March 2010, and all of the community expenses. (RP 158, 261) The trial court also considered the fact that Chad agreed to waive any award of child support from Deborah even though all three children were to reside with him under the parenting plan. (RP 307)

A decree dissolving the parties' marriage was entered on July 8, 2012. (CP 13, 29) The trial court denied Deborah's motion for reconsideration, which was filed by new counsel. (CP 84) Deborah appeals.

III. ARGUMENT

This appeal challenges largely fact-based decisions of the trial court that were well within its broad discretion. In many instances, the errors alleged were those of appellant's own making, were not raised below, or are harmless. Further, appellant cites to virtually no legal authority to support her arguments on appeal. *See Matter of Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (it is not this court's function "to comb the record with a view toward constructing arguments for counsel."). This court should end the conflict between these parties and affirm the trial court's decision in all respects.

A. The Trial Court Could Not Have Erred In Failing To Consider Testimony From The Evaluator When The Mother Failed To Make Arrangements For The Evaluator To Testify.

The trial court could not have erred for "fail[ing] to hear Dr. Poppleton," (App. Br. 11), when it never excluded Dr. Poppleton from testifying. Whether Dr. Poppleton appeared at trial was entirely in the hands of the mother. She even concedes that "it it is likely that if Dr. Poppleton was available to converse on the phone with the Wife in the morning, he was also available to testify in court in the afternoon." (App. Br. 11) That being the case, it was

the mother's responsibility to call her witness to trial, and she could have done so during a break in the proceeding. It was neither up to the trial court nor the father to make arrangements for the mother's witnesses to testify. "Pro se litigants are bound by the same rules of procedure and substantive law as attorneys." *Westberg v. All-Purpose Structures Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997).[3]

In any event, the trial court did "hear" from Dr. Poppleton, because his reports were admitted as evidence at trial. (Exhibit 1) The mother does not explain what Dr. Poppleton would have testified to that was different from his reports. *See* ER 103(a)(2); *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 618, 762 P.2d 1156 (1988) (in order to preserve error for review party must make an offer of proof sufficient to "advis[e] of the specific testimony to be offered and the reasons supporting its admissibility").

Finally, the mother claims that the trial court performed a "bait and switch," because it had mentioned during her cross-examination of Foster that some of her questions might be better asked of Dr. Poppleton. (App. Br. 9-10, *citing* RP 32) But that was

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[3] The mother was represented after trial when she filed a motion for reconsideration (CP 59), and is represented by counsel for this appeal.

before it was determined that the mother had not actually called Dr. Poppleton to testify. As the trial court later pointed out, if she wanted to "bring in Dr. Poppleton then you'd have to contact him, probably you'd have to pay. And you'd have to get him here." (RP 190) But the mother failed to do so, and the fact that Dr. Poppleton was not heard by the trial court in oral testimony was not an error warranting reversal by this court.

B. The Parenting Plan Crafted By The Trial Court Was Well Within Its Discretion, And Supported By Substantial Evidence.

Trial courts are given broad discretion to fashion a parenting plan based upon the children's best interests, after consideration of the statutory factors. *Marriage of Jacobson,* 90 Wn. App. 738, 743, 954 P.2d 297, *rev. denied,* 136 Wn.2d 1023 (1998) (*citing Marriage of Littlefield,* 133 Wn.2d 39, 52, 940 P.2d 1362 (1997)). "Because of a trial court's unique opportunity to observe the parties to determine their credibility and to sort out conflicting evidence, its decisions are allowed broad discretion." *Marriage of Woffinden,* 33 Wn. App. 326, 330, 654 P.2d 1219 (1982), *rev. denied,* 99 Wn.2d 1001 (1983). Appellate courts are "extremely reluctant" to disturb child placement decisions. *Parentage of Schroeder,* 106 Wn. App. 343, 349, 22 P.3d 1280 (2001) (citations omitted). Discretion is

abused only if the decision is manifestly unreasonable or based on untenable grounds. *Jacobson*, 90 Wn. App. at 743.

1. It Was Within The Trial Court's Discretion To Deny The Mother's Request To Establish A Parenting Plan That Might Switch Primary Care Of The Children To Her When It Was Not In The Children's Best Interests.

It was well within the trial court's discretion to designate the father as the primary residential parent after hearing the evidence and weighing the credibility of the parties. Without citation to any legal authority, the mother complains that the trial court "should have established criteria by which the Wife could resume primary custody." (App. Br. 11-12) Her argument appears to be based on the faulty belief that the trial court was required to adopt Dr. Poppleton's recommendation. But the trial court was free not to follow the recommendations of the parenting evaluator if it believed such a plan was not supported by the evidence or in the children's best interests. *See Fernando v. Nieswandt*, 87 Wn. App. 103, 107-08, 940 P.2d 1380, *rev. denied*, 133 Wn.2d 1014 (1997). While the trial court should consider the recommendation of the custody evaluator, it is not bound by it. *Marriage of Swanson*, 88 Wn. App. 128, 137-38, 944 P.2d 6 (1997), *rev. denied*, 134 Wn.2d 1004 (1998). The trial court must independently weigh the parties'

comments and criticisms of the evaluator's recommendations, and make its own assessment of the children's best interests. *Swanson*, 88 Wn. App. at 138.

Here, there was substantial evidence to support the trial court's decision to place the children in the father' primary care without an avenue for the mother to obtain primary care. This was especially true when there was no credible evidence that the mother's behavior would sufficiently improve to warrant a change in primary care. The parties had been separated for more than three years by the time of trial. The wife's emotional stability had not improved and seemingly got worse despite repeated interventions by the evaluators, who warned the mother that her behavior was harmful to the children. (*See* Exhibit 1; RP 13, 17-18, 66-67, 70) While the trial court "hope[d]" the mother would "take advantage" of counseling and the parties could eventually "work toward a more equal parenting plan," it concluded that the "current status" required the children to continue to primarily reside with

their father. (RP 303)[4] The trial court found that "based upon the instability as indicated, the concern about parental alienation and the actual violence and disregard for some of the welfare of the children does justify the finding of the father as the primary in this case." (RP 303)

Under these circumstances, and particularly due to the high conflict between the parties, it was entirely appropriate for the trial court to limit further litigation over parenting. As our courts have recognized, there is a "strong presumption against modification of a parenting plan because changes in residences are highly disruptive to children." *Schroeder*, 106 Wn. App. at 350. Had the trial court ordered a provision allowing the mother to eventually resume primary care of the children, it would have only opened the door for further conflict between the parents both in and out of court, which both parenting evaluators agreed was not in the children's best interests. (*See* Exhibit 1)

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[4] To the extent the mother claims that the trial court's stated "hope" is inconsistent with its ultimate written ruling (App. Br. 12), "a trial judge's oral decision is no more than a verbal expression of his informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered modified or completely abandoned. It has no final or binding effect unless formally incorporated into findings, conclusions and judgment." *DGHI, Enterprises v. Pacific Cities, Inc.*, 137 Wn.2d 933, 944, 977 P.2d 1231 (1999) (*quoting Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963)).

2. Substantial Evidence Supports The Trial Court's Findings Of Fact.

While the mother complains about the trial court's findings of fact and asks that they be stricken, she does not deny that there was substantial evidence to support the trial court's ultimate decision to place the children primarily with the father. In fact, the mother's main objection appears to be the fact that the findings are more critical of her than of the father, and are, in her view, "one dimensional" and "un-judicial." (App. Br. 13-15)

While the mother purports to challenge all of the "four single-spaced pages of findings regarding the Wife's behavior," she only specifically addresses three findings, claiming they are not supported by substantial evidence. The mother has waived her challenge to those findings that she fails to specifically address. *Keever & Associates, Inc. v. Randall*, 129 Wn. App. 733, 741, ¶ 12, 119 P.3d 926 (2005), *rev. denied*, 157 Wn.2d 1009 (2006) (regardless of an assignment of error, if the issue is not argued or briefed by citation to authority or to the record, the argument is deemed waived). She fails to address any of the other findings of fact except to complain that the "tone" of the findings is "not right," and that the findings should be "concise." (App. Br. 15) Therefore,

even if the mother were successful in striking the three findings that she specifically addresses, the remaining findings are more than sufficient to support the trial court's parenting plan.

In any event, there is substantial evidence to support the findings that the mother does challenge. For example, the trial court found that "Ms. Burton has sent thousands of texts bashing Mr. Burton." (FF 2.19 (7), CP 21) The father testified about the extensive number of text messages sent by the mother:

> She's admitted to slamming my head in the wall and giving me stitches. She's screamed at me repeatedly in front of the kids. She's left me hours of voice mails, which I can play. *I've got a thing this thick (indicating) of text messages with threats of filing a restraining order, talking, you know, trying to contact clients, all things. I mean, she just – this went on for now almost three years.*

(RP 74-75, emphasis added; *see also* RP 171-76) The first evaluator, Jeff Foster, also reported that he viewed "voluminous texts" showing the mother being "irrationally angry, histrionic, and emotionally labile:"

> I have observed her personally, and have interview corroboration from her friends and neighbors (reported below), and been supplied with *voluminous texts,* to be irrationally angry, histrionic, and emotionally labile in a degree that translates into ill-considered acting out behavior that includes multiple examples of shouting at Mr. Burton in front of the children using language that has the effect of

> undermining their respect and affection for him. While I am not a finder of fact it is my opinion that Ms. Burton's behavior is consistent with an interpretation that constitutes willful, calculated, repeated attempts to alienate the children from Mr. Burton.

(Exhibit 1: Foster February 9, 2011 Evaluation at 5, emphasis added)

There is also substantial evidence, including testimony from the mother herself, to support the trial court's finding that the father of her fourth child "was/is married and his wife had their second child, around the time Ms. Burton had baby Chase." (FF 2.19 (8), CP 21) The mother testified that after she got pregnant, the father of her fourth child reunited with his wife, from whom he was separated, because she was pregnant. (RP 214-15)

To the extent neither party testified regarding this man's employment history or a specific incident involving the children's babysitter, any error by the trial court in making these findings are harmless because the mother does not dispute that the other thirteen findings support the trial court's parenting plan. "Error without prejudice [ ] is not grounds for reversal." *Welfare of Ferguson*, 41 Wn. App. 1, 5, 701 P.2d 513, *rev. denied*, 104 Wn.2d 1008 (1985); *Ford v. Chaplin*, 61 Wn. App. 896, 899, 812 P.2d 532

(appellant must show that her case was materially prejudiced by a claimed error. Absent such proof, the error is harmless), *rev. denied*, 117 Wn.2d 1026 (1991).

C. This Court Should Reject The Wife's Argument Seeking A Judgment For Her Cash Award When She Failed To Raise This Issue Below, And Cites No Legal Authority To Support Her Demand On Appeal.

The wife claims that the trial court erred in failing to reduce her money award to judgment, but devotes less than a half page of her brief to this issue. (App. Br. 16) The wife never asked for this award as a judgment at trial or in her motion for reconsideration, filed after the trial court's decision by new counsel. (*See* CP 61-70) This court should reject her belated argument because she failed to preserve it below. Absent any indication in the record that appellant advanced this particular claim in any substantive fashion at trial, it cannot be considered on appeal. *Marriage of Studebaker*, 36 Wn. App. 815, 818, 677 P.2d 789 (1984); *see also* RAP 2.5(a); *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (declining to review issue, theory, argument, or claim of error not presented at the trial court level). The purpose of this rule is to afford the trial court an opportunity to correct alleged errors,

thereby avoiding unnecessary appeals and retrials. *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447, *rev. denied*, 145 Wn.2d 1004 (2001).

This court should also reject this argument because the wife cites no authority for her claim that "without a judgment, the amortization schedule is not enforceable." (App. Br. 16) The decree orders the husband to pay the equalizing payment to the wife as an obligation assigned to him. (*See* CP 33, 35) There is no evidence that in the event the husband fails to make the required payment that the wife would be prevented from enforcing the decree by motion in the superior court. "A court of equity has power not only to decree, but to enforce its decrees in its own way, in the absence of a definite procedure." *Marriage of Crossland*, 49 Wn. App. 874, 877, 746 P.2d 842 (1987) (citations omitted).

D. The Trial Court Did Not Abuse Its Discretion In Taking Into Consideration The Husband's Financial Support Of The Wife During The Parties' Separation When Making Its Maintenance Award.

An award of spousal maintenance is discretionary, and will not be disturbed on appeal absent a showing that the trial court abused its discretion. *Marriage of Luckey*, 73 Wn. App. 201, 209-10, 868 P.2d 189 (1994). The trial court's discretion in awarding

maintenance is "wide;" the only limitation on the amount and duration of maintenance is that, in light of the relevant factors under RCW 26.09.090, the award must be "just." *Luckey*, 73 Wn. App. at 209.

Here, the trial court did not abuse its discretion in awarding the wife maintenance for an additional six months after the decree was entered in light of the substantial support the wife received from the husband during the parties' separation. Even if some of that support could be considered "child support" when the children lived primarily with the mother, the wife still received funds above and beyond that amount for her own personal support. For example, using the husband's monthly net income of $10,000, the combined monthly support for the three children – an obligation that would be shared by the parties – was $2,760 under the child support schedule. RCW 26.19.020.[5] The husband testified that between June 2011 and trial in May 2012, he provided the wife support of over $54,000, or more than $4,900 per month. (RP 56, 156-60) Before then, the husband was paying the wife $2,000 per

[5] The mother would share in this obligation in proportion to her income, including any maintenance provided to her, or a minimum of $50 per child. RCW 26.19.065(2).

month for her to pay for groceries and her cell phone, while the husband paid all other bills for the family. (RP 156-60) Any amount above what he would be required to pay in child support during the time that the children resided with the wife was, in effect, spousal maintenance.[6] The trial court's consideration of this past support in considering its future maintenance award was well within its discretion. *See Luckey,* 73 Wn. App. at 209 (affirming the trial court's denial of an additional award of spousal maintenance after a 14-year marriage when the husband had already provided combined child support and maintenance to the wife during their one-year separation).

Furthermore, the wife provides no support for her claim that the "correct maintenance amount" should have been "$2,000-$4,000/ month for thirty months," (App. Br. 20), nor for her claim that the "rule of thumb for calculating maintenance is one year for every four years of marriage." (App. Br. 17) There is no magic formula for an appropriate award of maintenance. Nor should there be, as this would undermine the trial court's "wide" discretion

[6] During part of this period, the children lived primarily with the father without any support from the mother.

under RCW 26.09.090 to make a "just" maintenance award. *Luckey*, 73 Wn. App. at 209.

Here, there were several factors that supported the trial court's maintenance award. In making a maintenance award, the trial court not only must consider the wife's need, but also the husband's ability to pay. RCW 26.09.090(1)(a), (f). In this case, the husband has limited ability to pay maintenance. The property awarded to him largely consisted of his interest in a business that was not liquid and his retirement accounts. (CP 27-28) The husband was ordered to pay $4,500 per month to the wife as her share of property, all of the community debts of $126,000, and he is entirely responsible for the support of the parties' three children, who under the child support schedule require monthly support of $2,760.

Meanwhile, the wife, age 35, was "young enough that she can start a career and work a full career," and had already more than two years since the husband filed for dissolution to make efforts for retraining. (*See* FF 2.12, CP 17; RP 67-68) The trial court also acknowledged that additional maintenance was not warranted because the parties had not had an "opulent style of life during the marriage." (FF 2.12, CP 16)

The trial court also did not abuse its discretion in considering the cash payments that the wife would receive as part of her property award when making its maintenance award. In awarding spousal maintenance, the trial court must consider the property awarded to each spouse. *See Marriage of Estes*, 84 Wn. App. 586, 593, 929 P.2d 500 (1997). Specifically, the statute requires that the trial court consider the "financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently." RCW 26.09.090(1)(a); *see also Marriage of Crosetto,* 82 Wn. App. 545, 559, 918 P.2d 954 (1996) ("The trial court was entitled to consider the property division in its determination of maintenance, and to consider maintenance in its property division.").

E. Substantial Evidence Supports The Trial Court's Finding Regarding The Parties' Date Of Separation. In Any Event, The Trial Court's Property And Maintenance Award Was Not Premised On The 10-Month Period That The Wife Claims The Parties Had "Reconciled."

Whether a husband and wife are living "separate and apart" turns on the "peculiar facts" of each case. *Marriage of Nuss*, 65 Wn. App. 334, 344, 828 P.2d 627 (1992) (*citing Togliatti v.*

Robertson, 29 Wn.2d 844, 852, 190 P.2d 575 (1948)). A marriage is "for all practical purposes 'defunct,'" even though it has not been legally dissolved, when the parties have ceased to have a "community" relationship, and retain only a skeletal "marital" relationship. *Aetna Life Ins. Co. v. Bunt*, 110 Wn.2d 368, 372-73, 754 P.2d 993 (1988) (*Citing* Harry Cross, *The Community Property Law in Washington* (Revised 1985), 61 Wash. L. Rev. 13, 33).

Here, the husband testified, and the trial court found, that the parties separated on March 12, 2009. This was the date the husband was arrested for domestic violence and was removed from the family home. (RP 43, 72) When interviewed by the parenting evaluator, the wife agreed that this was when the parties separated. (Exhibit 1: Poppleton May 22, 2011 Evaluation at 13) While there was some evidence that the parties continued to be intimate, there was also evidence that both parties had become involved in other relationships. (RP 63, 170) In fact, the wife became pregnant with another man's child during this purported period of "reconciliation." (RP 6, 65-66)

Even if, as the wife claims, the trial court should have found that the parties separated in January 2010 – ten months later – when the husband file for dissolution, she does not explain how it

would have impacted the trial court's decisions. As she points out, the trial court appeared to believe that the wife was "better off" if the separation date was earlier rather than later. (App. Br. 24, *citing* RP 310-11) There is nothing in the record to support the wife's claim that the trial court would have made a different decision if it found the parties separated when the petition for dissolution was filed, rather than the earlier date. Error without prejudice [ ] is not grounds for reversal." *Welfare of Ferguson*, 41 Wn. App. 1, 5, 701 P.2d 513, *rev. denied*, 104 Wn.2d 1008 (1985).

F. The Wife Failed To Adequately Preserve Her Request For Attorney Fees Below.

The wife complains that the trial court failed to consider her purported request for attorney fees, but as she acknowledges, her request was more of a "forlorn hope than an oral motion." (App. Br. 24) Even when she claims that her later request was more "direct," it was still more of an "exchange" between the wife and the trial court. This discussion was not a request for attorney fees, but was whether certain debts – including her loans for attorney fees – were community or separate. (RP 252-57) To the extent that the wife intended this exchange to be a specific request for attorney fees that the trial court later failed to consider, she should have brought it to

the court's attention during its oral ruling or in her motion for reconsideration. Absent any indication in the record that appellant advanced this particular claim in any substantive fashion at trial, it cannot be considered on appeal. *Marriage of Studebaker*, 36 Wn. App. 815, 818, 677 P.2d 789 (1984); *see also* RAP 2.5(a); *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001).

In any event, an award of attorney fees based on the wife's purported "need" was not warranted in light of the significant cash award she received as part of the property distribution, which she receives tax free on a monthly basis, her additional maintenance award, and the fact that she was entirely relieved of any child support obligation. Therefore, even if the trial court had considered the wife's purported request for attorney fees, it would have been well within its discretion to deny an award of attorney fees to the wife under these circumstances.

G. This Court Should Deny The Wife's Request For Attorney Fees On Appeal.

This court should deny the wife's request for attorney fees on appeal. The wife does not have the need for an award of attorney fees, and the husband does not have the ability to pay. Further,

because this appeal is frivolous, the wife should not be rewarded with an award of attorney fees.

The wife can pay her own attorney fees for bringing this appeal, which raises a multitude of fact-based decisions that are unpreserved, not supported by legal authority, or were based on litigation decisions that she made. If any party should be awarded attorney fees, it should be the husband, who is forced to respond to a frivolous appeal that unnecessarily continues the litigation at great expense to both parties. *Marriage of Greenlee,* 65 Wn. App. 703, 711, 829 P.2d 1120, *rev. denied*, 120 Wn.2d 1002 (1992); RAP 18.9(a) (authorizing terms and compensatory damages for a frivolous appeal). Although an award of attorney fees to the husband is warranted, the husband waives any request for fees because he recognizes that such an award would only increase the conflict between the parties. Each party should be ordered responsible for their own attorney fees.

IV. CONCLUSION

This court should affirm the trial court's orders that were all made within its discretion and supported by substantial evidence. This court should deny the wife's request for attorney fees.

Dated this 15th day of March, 2013.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 15, 2013, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 15th day of March, 2013.

V. Isaksen

Victoria K. Isaksen

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